86-601

Supreme Court, U.S.
FILED
OCT 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DONALD H. MATHES
and
PATRICIA MARIE MATHES,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Donald H. Mathes
Madlaveien 61
N-4000 Stavanger
NORWAY
47(4) 52 07 04

Petitioner Pro Se

Patricia Marie Mathes
P.O. Box 79716
Houston, Texas 77279
UNITED STATES OF AMERICA
1 (713) 496-4252

Co-Petitioner

Filed October 14, 1986

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QUESTIONS PRESENTED

1. Does an ex parte action by IRS in a Tax Court proceeding violate taxpayer's due process rights, where IRS' motion to dismiss taxpayer's petition is not served upon overseas taxpayer until six days after the court decides the motion?

2. Does a U.S. and Texas citizen who resides and works abroad have a right to the protection of U.S. law?

3. Does assessment by the D.C. Circuit of double costs and attorney fees against a citizen violate a citizen's First Amendment right to petition his government for redress of grievances, where citizen has raised substantial meritorious claims?

4. Did IRS violate federal law by its intentional disregard of over $12,000 withheld from taxpayer's wages?

5. Do the courts have a primary duty to provide the protection of law to a citizen?

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DONALD H. MATHES
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v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia affirming on April 18, 1986 the dismissal, for failure to properly prosecute, of a petition brought in United States Tax Court, in which petitioners sought redetermination of federal income taxes.

OPINION BELOW

Petitioners' petition for determination of alleged federal income tax liabilities timely brought in the Tax Court was dismissed for "failure properly to prosecute." (Appendix C, App p.10) On a direct appeal to the U.S. Court of Appeals for the District of Columbia Circuit, the Tax Court's action was affirmed in an opinion published at 788 F.2nd 33 (D.C. Cir. 1986). (Appendix B, App p.3) The Court of Appeals rendered its decision on April 18, 1986. Petitioners timely filed a Petition for Rehearing, which petition was denied by Circuit Court's order dated July 16, 1986. (Appendix A, App p.1)

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1986, which judgment was made on Petitioners' Petition for Rehearing. Petitioners' motion is timely filed within ninety days after the Court of Appeals

judgment of said date. Jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Does an ex parte action by IRS in a Tax Court proceeding violate taxpayer's due process rights, where IRS' motion to dismiss taxpayer's petition is not served upon overseas taxpayer until six days after the court decides the motion?

2. Does a U.S. and Texas citizen who resides and works abroad have a right to the protection of U.S. law?

3. Does assessment by the D.C. Circuit of double costs and attorney fees against a citizen violate a citizen's First Amendment right to petition his government for redress of grievances, where citizen has raised substantial meritorious claims?

4. Did IRS violate federal law by its

intentional disregard of over $12,000 withheld from taxpayer's wages?

5. Do the courts have a primary duty to provide the protection of law to a citizen?

CONSTITUTIONAL PROVISIONS INVOLVED

1. First Amendment to the U.S. Constitution of the United States:

> Congress shall make no law. . . abridging. . .the right of the people. . .to petition the government for redress of grievances.

2. Fifth Amendment to the U.S. Constitution of the United States:

> No person shall. . .be deprived of life, liberty, or property, without due process of law. . .

STATEMENT OF THE CASE

Petitioner Donald H. Mathes (Mathes) prepared and filed a federal income tax return for himself and his wife for taxable year 1980. Line 55 of the Form 1040 of that return reported that $11,495.12 had been withheld

from wages, specifically for federal income tax in 1980. This figure was confirmed by three forms W2 which were attached to the 1980 return. Mathes also reported $715.72 in excess FICA tax withheld on line 59, thus total payments of federal tax withheld were reported on line 62 as $12,210.84. Respondent Commissioner (IRS) has never cast any doubt on this figure.

It was with surprise, then, that Mathes received a notice of deficiency from IRS dated September 8, 1982 in which IRS gave no credit for the $12,210.84 paid by withholding in 1980. The notice was dated a few weeks before Mathes departed for Norway on a two-year contract to work as an engineer for a Norwegian oil company.

Mathes timely filed his petition with the U.S. Tax Court and raised in his first petition various issues, including inter alia "medical and dental expenses," "taxes and

interest expense," "miscellaneous deductions," "negligence or intentional disregard of rules penalty." Because he was rushed on his first petition and out of country, Mathes requested time to file a full petition, and the Tax Court granted him until February 17, 1983 to file an amended petition, which Mathes filed. In his amended petition Mathes attached numerous attachments, including inter alia, attachment "RW" in which Mathes itemized by check number and date and payee medical expenses, cash contributions, and other deductible items. Later the Tax Court ordered Mathes to file an amended petition limited to issues for which summary judgment had not been granted IRS on IRS' motion in which IRS declared various issues as "frivolous," e.g. wages not income. Thereupon, Mathes filed his limited issues petition and alleged specifically various errors in the notice of

deficiency, including inter alia failure of IRS to allow medical expenses and other deductions. Mathes included also within these petitions arguments which the Appellate Court later ruled as frivolous; e.g. that wages were not income.

Due to Mathes' location in Norway, Mathes indicated to the Tax Court that no trial was needed pursuant to Rule 122(a) of the Tax Court Rules and he therefore submitted detailed documentation re his claim of no tax owed. The various dates of pleadings are discussed in the Circuit Court's opinion at pages 3-4, (App. pgs. 5-6).

Tax Court set a trial date for February 28, 1984 in Houston, Texas, a time which the court and IRS well knew that Mathes was in Norway. Mathes requested by mail posted in Norway on December 22 that the trial be delayed. Rather than acting on Mathes' written motion, the Tax Court calendared the motion for hearing on

February 28 in Houston. Then on February 2, 1984 Mathes reiterated his request for a continuance and moved to enjoin the Commissioner from seeking dismissal of his petition. Id., page 4 (App. pg.6) The February 2 motion was also calendared for February 28, 1984.

Due to his employment in Norway and his lack of funds to travel to the U.S., and/or to employ counsel to represent him in Houston on the 28th, Mathes did not appear. Tax Court summarily denied or ignored Mathes' pending motions, whereupon IRS filed with the Court their "Motion to Dismiss for Failure Properly to Prosecute." ("Tax Court Order of Dismissal Decision" entered April 5, 1984) (App. pg.10) But Mathes did not receive IRS' motion to dismiss until April 11, 1984, in Norway, six days after the order granting the motion was entered, and over a month after IRS filed with the court its motion! (Mathes'

"Appendix" to D.C. Cir. at p. vii and 405.) (IRS, it seems had a habit of sending pleadings to Mathes by surface ship rather than air mail, even during the D.C. appeal process, as when IRS sent its response brief by surface ship, as required by FRAP Rule 25(a). IRS' response brief was sent to Norway by boat! (Mathes' "Supplemental Brief" in support of Petition for Rehearing, p.3.) Mathes never did learn of what happened to a "Motion for Reconsideration" (of partial summary judgment granted IRS) he posted to the Tax Court on February 4, 1984, which was received and filed on February 13, 1984. (Mathes' "Motion to Correct Errors in Opinion" filed with D.C. Cir.)

Mathes experienced similar problems with receipt of correspondence and pleadings/briefs during the pendancy of his appeal to the Circuit Court. For example, he received an order from the Appellate Court on just a few

days before his opening brief was due as indicated in said order. Because of shortness of time, Mathes initially submitted a "Preliminary Appeal Brief" to the Circuit Court, raising inter alia issues of "abuse of discretionary powers," "unfair dismissal of Tax Court case," "no credit for withholding," and "itemized deductions." These issues were discussed in some detail, whereas other issues were given in a long laundry list totalling some 57 issues. Some of the laundry list issues included, inter alia, "Sixteenth Amendment," "wages are an equal exchange for labor, not gain," and "citizens have a right to privacy."

Notwithstanding Mathes' raising substantive, viable tax issues in both the Tax Court and the Circuit Court, these issues were totally ignored by the D.C. Circuit's opinion. Rather, the Appellate Court found at page 4

(App.pg. 6) that:

> This appeal is frivolous. It is abundantly clear from the record that the Tax Court did not abuse its discretion in dismissing the case.

The Appellate Court then went to great length to point out various issues raised by Mathes which the Court deemed as totally without merit, but at the same chose to ignore the substantive issues raised by Mathes. (The issue of ex parte proceeding is raised for the first time in this appeal.)

While the Circuit Court opinion indicates that: "The substantive merits of a claim are of course irrelevant to the propriety of a dismissal for failure to prosecute. . . " the court did, without addressing the vitality of at least some of Mathes' claims, grant an assessment against Mathes of double costs and reasonable attorney fees! (Id. at 5 and 7, App. p.7 and 9) The court apparently was of the opinion that Mathes has instituted

"obstructive and vexacious litigation" and has petitioned the Tax Court "merely for delay" when in truth and fact, Mathes has raised substantive issues of substantial merit and claimed as a credit over $12,000 in withholding, which credit was totally ignored by IRS, Tax Court and the D.C. Circuit!

Mathes' wife's name was ordered struck from the Tax Court petition by the Tax Court for reason that it was not signed by her. She later filed with the D.C. Circuit a notice of consent to be reinstated as a petitioner.

I.

EX PARTE ACTION BY IRS IN A TAX COURT PROCEEDING VIOLATES TAXPAYERS' DUE PROCESS RIGHTS, WHERE IRS' MOTION TO DISMISS TAXPAYERS' PETITION IS NOT SERVED UPON OVERSEAS TAXPAYERS UNTIL SIX DAYS AFTER THE COURT DECIDES THE MOTION.

Ex parte motions are highly disfavored. The reason is simple: one is denied a due course, or the due process of law and, as has happened in this case, stands to be deprived

of property without due process of law. Fifth Amendment, U.S. Constitution.

Here IRS and Tax Court were obviously not interested in insuring that Mathes had opportunity to be heard. On February 28, 1984 when Mathes did not appear for the calendar call on the trial of the case, and for the hearing of the motions, including his Motion for Postponement of Trial Date, IRS filed a Motion to Dismiss for Failure Properly to Prosecute and sent same to Mathes. Having received no response from Mathes, for reason that Mathes had not yet received the IRS' motion, Tax Court on April 5, 1984 granted the motion. It was six days later, April 11 that Mathes received the subject motion.

Both IRS and Tax Court were well aware of Mathes' location in Norway. It must be presumed that both the IRS attorney and the Tax Court judge (former IRS attorney) are

sworn by oath to protect the Constitution of the United States and thereby protect the rights of citizens, Article VI, U.S. Constitution. Yet, the oath was violated by both oath takers by their callous disregard for the rights of Mathes.

Query: Considering that IRS filed its motion on February 28, 1984, and further considering no receipt by the Tax Court of a response by Mathes, was not the Tax Court at least somewhat curious on April 5, 1984 as to whether or not Mathes had in fact been served with the motion? Apparently not.

Our "system of justice" deserves more than endorsement by the D.C. Circuit and by this court of ex parte proceedings. With cold, calculated disregard for the constitutional rights of Mathes, IRS attorney in IRS' response brief to the D.C. Circuit stated at page 7:

> On the Commissioner's motion

> (DOC. 35), the Tax Court entered an order (DOC. 37) on April 5, 1984, dismissing the petition for failure properly to prosecute and, thus sustaining the Commissioner's deficiency determinations.

It should be obvious that the subject oath takers failed in their duty to not only afford Mathes due process of law but as well to protect him under the law.

It is a fundamental part of our system of jurisprudence that an individual involved in civil litigation is entitled, as a matter of constitutional due process, to such notice of the pendancy of any matters as is reasonably calculated to apprise him of that matter. This court has stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendancy of the action and afford them an opportunity to present their objections.

Mullane v. Central Hanover Bank & Trust Co., 70 Sup.Ct. 652 (1950).

Here, Mathes was not afforded opportunity to present his objection to the IRS' motion to dismiss the Tax Court action for "failure properly to prosecute." Failure on behalf of IRS and the court to give Mathes notice of the pending motion "violated the most rudimentary demands of due process of law." Armstrong v. Manzo, 85 Sup.Ct. 1187 (1965).

II.

A CITIZEN WHO RESIDES AND WORKS ABROAD HAS A RIGHT TO THE PROTECTION OF LAW.

The right of a citizen to the protection of law is a fundamental, unalienable constitutionally protected self-evident right. A detailed presentation supporting the truth of this statement should be unnecessary, as the statement is supported by ample authority, including inter alia the Magna Carta of 1215, the Mayflower Compact of 1620, the English

Bill of Rights of 1689, the American Declaration of Independence of 1776, the United States Constitution of 1787, the Texas Declaration of Independence of 1836, the Texas Constitution of 1876, the United States Declaration of Human Rights of 1948.

In this case IRS and the lower courts have consistently treated Mathes as if he is the type of "taxpayer" or "person" who has no constitutional rights, as if he is some wayward "creature of the state," such as a corporation. See Hale v. Henkel, 201 U.S. 43 (1906), pgs. 74 and 74.

Both Mathes and his wife are soverign citizens and come before IRS and the courts with all constitutional rights in tact and undiminished. Mathes has the right to travel and work in friendly but foreign nations. See Articles of Confederation of 1777 (Article IV), United States Constitution of 1787 (Article IV), Aptheker v. Secretary of State,

378 U.S. 500 (1964).

Thus, Mathes has a constitutionally protected right to reside and work in Norway and indeed should not be required to sacrifice any privileges and immunities as a result of exercise of said protected rights.

III.

ASSESSMENT BY THE D.C. CIRCUIT OF DOUBLE COSTS AND ATTORNEY FEES AGAINST MATHES VIOLATES MATHES' FIRST AMENDMENT RIGHT TO PETITION HIS GOVERNMENT FOR REDRESS OF GRIEVANCES, WHERE MATHES' TAX COURT PETITION AND SUBSEQUENT APPEAL CONTAIN MERITORIOUS CLAIMS.

As discussed supra, the D.C. Circuit repeatedly and totally ignored the meritorious claims toward reduction in claimed federal taxes, which meritorious claims were made by Mathes in his various petitions to the Tax Court and in his appeal papers to the D.C. Circuit. Indeed, Mathes in his "Preliminary Appeal Brief" filed with the D.C. Circuit, at page 3 raised his "Second Issue - Unfair

Dismissal of Tax Court Case," stating inter alia:

> Tax Court Rule 122(a) allows for a submission of evidence without trial and states that the "parties need not appear in court." Judge Wilbur [Tax Court judge] never provided any valid reason for an inconvenient and expensive appearance of citizen Mathes at a hearing or a trial in Houston while he was under contract to work in Norway . ...

Similiarly, at page 4 Mathes urged his "Fourth Issue - No Credit for Withholdings." See also Mathes' "Sixth Issue - File 6653 Penalty" at page 6 and his argument thereunder at page 7:

> Even if citizen Mathes had violated some obscure IRS rule and was legally liable to pay a 5% penalty, the $878.89 amount would still be defective. Section 6653(a) imposes a 5% penalty on the underpayment. As noted above (in the fourth issue) the Commissioner has grossly exaggerated the alleged "underpayment" by deliberately neglecting to credit $12,210.84 in withholding (from wages) against the alleged underpayment of $17,577.86. Thus the Commissioner has also

> grossly exaggerated his 6653 penalty determination.

And see Mathes' "Seventh Issue - Itemized Deductions" at page 8. These issues are not even mentioned in passing by the D.C. Circuit. Rather, the court relying on a battery of cases dealing with pro se litigants who raise frivolous claims merely for delay, the court penalized Mathes double costs and attorney fees for Mathes' valid exercise of his right to petition the government for redress.

Mathes raised this First Amendment issue in his "Objections to Bill of Costs," pgs 2-3, filed with the D.C. Circuit.

This court has held that the right to petition for redress of grievances is "among the most precious of the liberty safeguarded by the Bill of Rights." See United Mine Workers of America District 12 v. Illinois State Bar Association, 88 Sup.Ct. 353, 356 (1967). This right to petition for redress

occupies a "preferred place" in our system of representative government, and enjoys a "sanctity in a sanction not permitting dubious intrusions." Thomas v. Collins, 65 Sup.Ct. 315, 322 (1945). Indeed,

> ... [i]t was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guarantee with the rights of the people peaceably to assemble and to petition for redress of grievances. Id at 323.

And this court has expressly held that the right to petition protects the individual's right to file an action with a "reasonable basis" in a state tribunal. Bill Johnson's Restaurants, Inc. v. NLRB, 103 Sup.Ct. 2161 (1983). See also Gregory v. City of Chicago, 89 Sup.Ct. 949, 948 (1969); California Motor Transport Co. v. Trucking Unlimited, 92 Sup.Ct. 609 (1979); and Bigelow v. Virginia, 95 Sup.Ct. 2222 (1975).

And while D.C. Circuit was quick to

chastise Mathes for his inclusion of "frivolous" arguments, what can be said of the IRS which has caused to be issued a notice of deficiency deleting from the notice credit for over $12,000 in taxes withheld?

IV.

IRS VIOLATED LAW BY ITS INTENTIONAL DISREGARD OF OVER $12,000 WITHHELD FROM MATHES' WAGES.

Title 26, U.S.C. Sec. 31(a)(1) states in part that:

> The amount withheld as tax on the wages ... shall be allowed to the recipient of the income as a credit against the tax imposed by this subtitle. (Emphasis added)

IRS and Tax Court had no discretionary power to disallow credit for taxes withheld from wages. Likewise, IRS illegally computed a 5% penalty on the $12,210.84 which had been paid in as tax through withholding, for a total of $610.54.

IRS, and the lower courts, then have acted in a manner obviously contrary to statutory

and constitutional limitation on their powers. "No man in this country is so high that he is above the law." U.S. v. Lee, 106 U.S. at 1220 quoted in Butz v. Economu, 438 U.S. 478 (1974).

Abuse of power cases are nothing new to this court. Little v. Barrene, 2 Cranch. 170 (1804). President of the United States acted beyond his authority); Bates v. Clark, 95 U.S. 204 (1977) (federal officer acted beyond his authority).

This nation is a nation of law, not of men. To hold otherwise leads to the obvious: anarchy.

V.

COURTS HAVE A PRIMARY DUTY TO PROVIDE THE PROTECTION OF LAW TO A CITIZEN.

The Supreme Court has declared that one of the primary duties of government is to provide the protection of law to its citizens. At pages 163 and 164 of Marbury v. Madison, 1

Cranch 137 (1803), Chief Justice John Marshall declared that:

> The very essence of civil liberty certainly consists in the right of every individual to claim the PROTECTION of the LAWS whenever he receives an injury. One of the FIRST DUTIES of government is to afford that PROTECTION.
>
> Is it to be contended that where the law in precise terms directs the performance of an act in which an individual is interested, the law is incapable of securing obedience to its mandate . . . the theory of this principle will certainly never be maintained. (Emphasis added)

Article II of the U.S. Constituion empowers the President to execute federal law. When the President (through his delegated Commissioner) fails to do this faithfully, Articles III and VI of the Constitution authorize federal judicial officers to exercise their supervisory powers over the Executive Branch and to insure that laws are executed faith-

fully. Thus federal courts especially have a primary duty to provide the protection of law to citizens who are the victims of law-breaking federal (e.g. IRS) agents.

In the case at bar, the judges both of the Tax Court and of the Court of Appeals have used their vast discretionary powers under a variety of contrived excuses to withhold the protection of law from Mathes and his innocent spouse.

A century ago, the Supreme Court at page 635 of Boyd v. U.S., 116 U.S. 616 (1886), declared that:

> . . . illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. . . It is the DUTY of courts to be watchful for the constitutional rights of the citizen, and against any stealthy

> encroachments thereon. Their motto should be obsta principiis.

See also Counselman v. Hitchcock, 142 U.S. 547 (1892) at page 581. Courts have a DUTY to protect citizens from the very first actions or threats of action by a tax collector which encroach on constitutional rights such as a right to the protection of law.

In Miranda v. Arizona, 384 U.S. 436 (1966), this court reversed convictions of Ernesto Miranda for kidnapping and rape because law enforcement officers had not used procedures which would adequately protect the Fifth Amendment rights of the rapist. This court saved a brutal, self-confessed and convicted rapist from serving a sentence of 20 to 30 years in prison in order to emphasize the importance of correct procedures by law enforcement officers.

In the case at bar, IRS avoided (probably deliberately avoided) using procedures which

would provide the protection of law to the Petitioners. By its omission of any mention in the Notice of Deficiency of a $12,210.84 credit for payment by withholding from wages, IRS was able to deceive a Tax Court judge into unlawfully ordering that the Petitioners must pay the full amount of the alleged $17,557.86 deficiency in addition to the $12,210.84 which had already been paid by withholding. The intention and willfulness of the IRS to abuse the Petitioners by oppression and extortion is proven by the continued resistance of the IRS to correct the "mistake." The supervision of the Supreme Court is required.

At pages 490 and 491 of Miranda, Mr. Chief Justice Earl Warren declared that:

> As courts have been presented with the need to enforce constitutional rights, they have FOUND MEANS of doing so. That ... is our responsibility (DUTY) today. Where rights (e.g. Right to Protection of Law) secured by the

> Constitution are involved, there can be no rule making or legislation which would abrogate them.
>
> (Emphasis and parenthetical notes for clarity.)

The Tax Court and the D.C. Circuit have more than adequate discretionary powers to provide the protection of law to Petitioners in this case. Judicial responsibility as noted above imposed a mandate on said courts to find a way to provide this precious constitutional right to the protection of law to the Petitioners. Instead, the lower courts in this case used their powers abusively in order to deny the protection of law to the Petitioners. The lower courts did not use their powers in a "manner in which the constitutional rights of the individual could be enforced against over-zealous police (e.g. IRS) practices." See page 444 of the Miranda opinion. The lower courts did not use their powers "to insure that what was proclaimed in

the Constitution had not become but a 'form of words' ... in the hands of government officials."

At page 232 of Harris v. New York, 401 U.S. 222 (1971), the Supreme Court declared that:

> ... it is monstrous that courts should aid or abet the law-breaking police officer. It is abiding truth that nothing can destroy a government more quickly that its failure to observe its own laws, or worse, its disregard of the charter of its own existence.

IRS agents have immense powers. Some IRS agents become so intoxicated by these powers that they forget that they must abide by the laws of the land just as all other law enforcement officers and citizens do.

At pages 479 and 480 of Miranda, the Supreme Court declared that:

> ... the Constitution has prescribed the rights of the individual when confronted with the power of government ... That right cannot be abridged. ... Decency, security and

> liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously... If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

See also Olmstead v. U.S., 277 U.S. 438 (1928)

CONCLUSION

For the reasons urged herein, it is respectfully requested that a writ of certiorari issue to review and reverse the judgment entered herein by the U.S. Court of Appeals for the District of Columbia Circuit.

DATED this ___ day of _____, 1986.

_____ _____

Donald H. Mathes
Maulaveien 61
N-4000 Stavanger
NORWAY
47(4) 52 07 04
Pro Se
By: Donald W. MacPherson,
Power of Attorney

Patricia Marie Mathes
Pro Se
By: Donald W. MacPherson
Power of Attorney

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 84-5456 September Term 1985

DONALD H. MATHES

v.

ROSCOE L. EGGER, JR.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED July 16, 1986

GEORGE A. FISHER
Clerk

BEFORE: Ginsburg, Scalia and Buckley, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing and of the supplemental brief in support thereof, it is

ORDERED, by the Court, that the clerk is directed not to file the supplemental brief and to return same to appellant and it is

FURTHER ORDERED, by the Court, that the petition for rehearing is denied.

RECEIVED

OCT 07 1986

App. 3

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5456

DONALD H. MATHES, APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE

Appeal from the United States Tax Court
(Civil Tax No. 27062-82)

Filed: April 18, 1986

Donald H. Mathes was on the brief *pro se.*

Glenn L. Archer, Jr., Assistant Attorney General, United States Department of Justice, *Michael L. Paup* and *Gary R. Allen*, Attorneys, Tax Division, United States Department of Justice, were on the brief for appellee.

Before: GINSBURG, SCALIA and BUCKLEY, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SCALIA.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

2 App 4

SCALIA, *Circuit Judge*: Donald H. Mathes appeals from an order of the Tax Court dismissing his petition for failure properly to prosecute. The appeal is utterly frivolous and "merit[s] public attention only as [an] illustration[] of irresponsible appellate practice deserving of sanction." *Granzow v. Commissioner*, 739 F.2d 265, 267 (7th Cir. 1984).

I

In 1981, Mathes and his wife, Patricia Marie Mathes, filed a joint tax return for 1980 in which they excluded from gross income almost $60,000 in wages. In a statement filed with the return, Mr. and Mrs. Mathes claimed that wages did not constitute "income" subject to taxation under the United States Constitution. Not surprisingly, on audit the Commissioner determined that the Matheses were indeed required to pay tax on their wages and issued a notice of deficiency.

Mathes brought suit in the United States Tax Court, seeking a redetermination of the deficiency. In his petition (as later amended) Mathes alleged, *inter alia*, that "neither he nor his wife was a person required to pay an income/excise tax or to prepare and file a return." In attachments to the petition, Mathes argued, *inter alia*, that wages are received in exchange for labor of equal value and therefore result in no taxable gain; that the IRS has "little or no jurisdiction over either the wages, income or persons of either the Petitioner or his wife or his children"; and that only employees of federal or state government are subject to the income tax. Much of Mathes's petition, and of his other filings, consisted of irrelevant polemic such as the following:

> The IRS is the "master" and the citizen must be the "obedient slave." The taxpayer can hope only for a few "crumbs" of mercy from his IRS "master"—after all every parasite must keep his host healthy enough to provide a continuing source of "blood to suck."

At the time Mathes filed his petition in the Tax Court, he had obtained employment abroad and moved to Norway. Nevertheless, Mathes requested that his trial take place in Houston, Texas. The Tax Court granted his request on November 29, 1982.

On April 21, 1983, the Commission moved for partial summary judgment. In opposing the Commissioner's motion, Mathes argued again that wages are not income and that he was not within the jurisdiction of the IRS. In addition, Mathes argued that no tax was due on his wages because he had been paid in Federal Reserve notes—an argument Mathes knew to be meritless because he had been told so when previously litigating the issue before the Tax Court, *see Mathes v. Commissioner*, 46 TAX CT. MEM. DEC. (P-H) ¶ 77,220, at 77-922 (July 14, 1977), and on appeal before the Fifth Circuit, *see Mathes v. Commissioner*, 576 F.2d 70, 71 (5th Cir. 1978). Likewise, Mathes asserted a right to jury trial even though he had been informed by the Fifth Circuit, as other tax protesters have been told repeatedly, that "[t]he law is . . . clear that a taxpayer who elects to bring his suit in the Tax Court has no right, statutory or constitutional, to a trial by jury." *Mathes*, 576 F.2d at 71-72.

On August 9, 1983, the Tax Court granted the Commissioner's motion and directed Mathes to file, on or before September 9, 1983, a proper amended petition limited to the issues on which summary judgment had not been granted. The Court warned Mathes that failure to file on time could result in dismissal of the remainder of his case. By order of September 26, the Tax Court extended the deadline to October 27; and on November 7, the Tax Court once again extended the deadline, this time to December 22. Both extensions were necessitated by Mathes's repeated failure to comply with the terms of the August 9 order. In the meantime, Mathes had been informed that his case was set for trial on February 28, 1984, in Houston.

By mail posted in Norway on December 22—and therefore received one week after the twice-extended deadline—Mathes submitted his amended petition (which was nevertheless accepted by the Tax Court) and asked that his trial be delayed because his employment in Norway had been extended, making it inconvenient for him to return to the United States at the present time. The Tax Court calendared Mathes's motion for hearing on February 28 in Houston. On February 2, Mathes reiterated his request for a continuance and moved to enjoin the Commissioner from seeking dismissal of his petition. The February 2 motion was also calendared for February 28.

Mathes neither appeared in court on February 28 nor engaged counsel to pursue his request for a continuance or proceed to trial. The Tax Court denied the pending motions and, at the request of the Commissioner, dismissed the suit for failure properly to prosecute. Mathes appeals that dismissal.

II

This appeal is frivolous. It is abundantly clear from the record that the Tax Court did not abuse its discretion in dismissing the case. Throughout the proceedings, the Tax Court showed remarkable patience in diligently attempting to discern whether Mathes's arguments had any shred of merit, in indulgently granting requests for time extensions, and in accepting Mathes's tardy filing. On the day his case was scheduled for hearing, neither Mathes nor counsel engaged by him appeared. The Tax Court was not obliged to hold this case in abeyance (and thereby delay collection of the assessed tax) pending the distant and as yet undetermined time when Mathes might decide to resume residence in the United States. And even if it were obliged to do so, it was entitled to demand that Mathes or his representative appear to argue the pending motions.

Mathes argues before us that dismissal of his petition was inappropriate because, *inter alia*, the Tax Court had

a "staggering number of detailed issues to resolve." Brief for Appellant at 1. The substantive merits of a claim are of course irrelevant to the propriety of a dismissal for failure to prosecute—but the irrelevance of the 57 "detailed issues" listed by Mathes is in any event exceeded by their absurdity. As part of his "7th Issue," Mathes alleges that he is entitled to a jury trial, although, as we noted above, Mathes was informed by the Fifth Circuit that he has no such right. Mathes's "55th Issue" is entitled "Federal Reserve Notes Are Not Dollars By Law," which is apparently a revival of the same ludicrous argument the Fifth Circuit rejected. We are not certain what to make of Mathes's "30th Issue—IRS Makes War On Citizens" or his "57th Issue—Tax Slavery." The remainder of Mathes's brief consists in large part of "arguments against the income tax which have been put to rest for years." *Parker v. Commissioner*, 724 F.2d 469, 472 (5th Cir. 1984). Cases rejecting claims identical to many of those made by Mathes, and in some instances characterizing those claims as "patently frivolous," "preposterous and nearly silly," "baseless," or "ludicrous," include *Charczuk v. Commissioner*, 771 F.2d 471, 472-75 & n.3 (10th Cir. 1985); *Sauers v. Commissioner*, 771 F.2d 64, 68-69 & n.6 (3d Cir. 1985); *Martin v. Commissioner*, 756 F.2d 38, 40 (6th Cir. 1985); *Lonsdale v. Commissioner*, 661 F.2d 71, 72 (5th Cir. 1981).

III

For Mathes, the frivolous nature of this appeal is not an aberration. On at least four previous occasions, he has ventured into court on tax matters. *See Mathes v. Commissioner*, 50 A.F.T.R.2d (P-H) ¶ 82-5233 (S.D. Tex. May 27, 1982); *Mathes v. Scott*, 40 A.F.T.R.2d (P-H) ¶ 77-5242 (S.D. Tex. Sept. 9, 1977); *Mathes v. Commissioner*, 46 TAX CT. MEM. DEC. (P-H) ¶ 77,220 (July 14, 1977), *aff'd*, 576 F.2d 70 (5th Cir. 1978); *Mathes v. Commissioner*, 63 T.C. 642 (1975). In none of these

cases was he successful and in none of them, as far as we can discern, did he present arguments with even a wisp of merit. In one illustrative case, Mathes sued a judge of the Tax Court and an attorney employed by the IRS for violating his constitutional rights. He alleged that during a hearing in one of his earlier frivolous lawsuits the judge and the attorney had been "discourteous to Plaintiff and acted in a 'snide, capricious and defamatory manner,' in refusing to answer his demand that they acknowledge that the Constitution is the supreme law of the land." *Mathes*, 40 A.F.T.R.2d at 77-5855.

Federal courts of appeals have the means to deal with obstructive and vexatious litigation. Rule 38 of the Federal Rules of Appellate Procedure states that "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." Similarly, 28 U.S.C. § 1912 (1982) states that "[w]here a judgment is affirmed by . . . a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs." (While this provision "speak[s] of 'damages for delay,' the courts of appeals quite properly allow damages, attorney's fees, and other expenses incurred by an appellee if the appeal is frivolous without requiring a showing that the appeal resulted in delay." FED. R. APP. P. 38 advisory committee note (collecting cases).) Finally, in the specific context of appeals from the Tax Court, we have "power to impose damages in any case where the decision of the Tax Court is affirmed and it appears that the notice of appeal was filed merely for delay." 26 U.S.C. § 7482(c)(4) (1982). Cases from other circuits sanctioning taxpayers for pursuing frivolous appeals include the following: *Eicher v. United States*, 774 F.2d 27, 30 (1st Cir. 1985) (*pro se* appellant assessed double costs); *Paulson v. United States*, 758 F.2d 61, 62 (2d Cir. 1985) (*pro se* appellant assessed double costs and reasonable attorneys' fees); *United States v. Isenhower*, 754 F.2d 489, 490 (3d Cir. 1985) (tax pro-

tester, in *pro se* appeal from criminal conviction, ordered to show cause why damages and single or double costs should not be imposed); *Sparrow v. Commissioner*, 748 F.2d 914, 915-16 (4th Cir. 1984) (appellant assessed double costs and attorneys' fees); *Crain v. Commissioner*, 737 F.2d 1417, 1418 (5th Cir. 1984) (*pro se* appellant assessed double costs and $2000 "damage award"); *Martin v. Commissioner*, 756 F.2d 38, 40-41 (6th Cir. 1985) (*pro se* appellant assessed double costs); *United States v. Ekblad*, 732 F.2d 562, 563-64 (7th Cir. 1984) (*pro se* appellant assessed double costs and reasonable attorneys' fees); *Hayward v. United States Tax Court*, 762 F.2d 706, 707 (8th Cir. 1985) (*pro se* appellant assessed double costs and attorneys' fees); *Ryan v. Bilby*, 764 F.2d 1325, 1328-29 (9th Cir. 1985) (*pro se* appellant assessed double costs); *Clark v. Commissioner*, 744 F.2d 1447, 1448 (10th Cir. 1984) (*pro se* appellant assessed double costs and attorneys' fees); *Fortney v. United States*, 774 F.2d 445, 446 (11th Cir. 1985) (*pro se* appellant assessed double costs).

We think similar action is called for here.

* * * *

The judgment of the Tax Court is affirmed and appellant is assessed double costs and reasonable attorneys' fees. The Commissioner shall file with this court within 14 days of the issuance of this opinion a submission as to the expenses he has incurred in litigating this frivolous appeal.

So ordered.

App. 2

Per Curiam

BY THE COURT:
GEORGE A. FISHER, CLERK

BY: Robert A. Bonner
Chief Deputy Clerk

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

DONALD H. MATHES Petitioner,	)	
v.	)	Docket NO 27062-82
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

ORDER OF DISMISSAL AND DECISION

This case was called from the calendar at the Trial Session of the Court at Houston, Texas on February 28, 1984. There was no appearance by or on behalf of petitioner. Counsel for respondent appeared and filed with the Court respondent's motion to dismiss for failure properly to prosecute. After due consideration, it is

ORDERED that respondent's motion to dismiss is granted and this case is dismissed for failure properly to prosecute. It is further

ORDERED and DECIDED that there is due from the petitioner a deficiency in income tax for the taxable year 1980 in the amount of $17,577.86, and addition to tax pursuant to Section 6653(a) of the Internal Revenue Code of 1954, as amended, for the taxable year 1980 in the amount of $878.89.

(Signed) RICHARD C. WILBUR

Judge

Entered: Apr 5 1984

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari by depositing the same in the United States Mail, Phoenix, Arizona, with sufficient airmail postage prepaid affixed thereto, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

and one copy to:

Michael L. Paup
Chief, Appellate Section
U.S. Department of Justice
Tax Division
Washington, D.C. 20530

this 16 day of October, 1986.

Donald W. MacPherson
3404 W. Cheryl Drive
Suite 250
Phoenix, AZ 85051
Attorney for Petitioners